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NORTHERN DISTRICT OF OHIO
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AYURVEDA USA, LLC
1536 Newton Pass
Broadview Heights, Ohio 44147

CASE NO.: 1:04CV2234
JUDGE: JUDGE WELLS

Plaintiff,

COMPLAINT

(Jury Demand Endorsed Hereon)

PONTIAC GENERAL HOSPITAL
d/b/a NORTH OAKLAND MEDICAL
CENTERS
461 West Huron
Pontiac, Michigan 48341

MAG. JUDGE PERELMAN

Defendant

x

For its complaint herein, Plaintiff AYURVEDA USA, LLC avers as follows:

PARTIES

1. Plaintiff Ayurveda USA, LLC (hereinafter "Plaintiff" or "Ayurveda") is a limited liability company organized and existing under the laws of the State of Ohio and has its principal place of business in Broadview Heights, Ohio. Ayurveda possesses an exclusive right to license throughout the United States a certain invention and method that can be used in providing specialized treatment to persons with disturbances of the central nervous system. The method involves the application of an adapted Russian cosmonaut suit,

named "Adeli®". The Adeli® suit is used in the treatment of patients affected by Cerebral Palsy and other neuromuscular disorders. It offers nonsurgical treatment for locomotor development in children and adults.

2. Upon information and belief, Defendant Pontiac General Hospital is a corporation organized and existing under the laws of the State of Michigan, conducts its business under the name North Oakland Medical Centers (hereinafter "Defendant" or "NOMC"), and has its principal place of business in Pontiac, Michigan. NOMC touts itself as the only clinic to provide suit therapy in the United States, using the original Adeli® suit design developed in Russia.

JURISDICTION AND VENUE

3. This is an action that arises, in part, under the Patent Laws of the United States, United States Code, Title 35. Additionally, it arises pursuant to 15 U.S.C. § 1051 *et seq.* and Section 43(a) of the Lanham Act, 15 U.S.C. § 1125. This Court has jurisdiction over the claims Plaintiff is asserting pursuant to 28 U.S.C. § 1338. Additionally, this Court has jurisdiction over the claims Plaintiff is asserting pursuant to 28 U.S.C. § 1332(a) because there is complete diversity of citizenship between the Plaintiff and Defendant and the amount in controversy exceeds \$75,000, exclusive of interest and costs. This Court has pendent jurisdiction over Plaintiff's claims arising under state law.

4. Venue is proper under 28 U.S.C. § 1391(b).

FACTUAL BACKGROUND

5. The Adeli® suit and the rehabilitation method accompanying the suit, was developed by a Russian firm "Ajurveda" owned and operated by Ajurveda Joint Stock Company, a corporation organized and existing under the laws of Russia. Since April 1994, a licensed Polish-Russian joint venture company named Euromed Rehabilitation Center, located in Mielno, Poland, has been utilizing this method of rehabilitation for children and teenagers afflicted with Infantile Cerebral Palsy Disorder. This method is based on the application of an adapted cosmonaut-rehabilitation suit, named "Adeli®". The suit and its method have been patented in forty-six countries, including the United States.

6. Plaintiff has an exclusive right from Ajurveda Joint Stock Company to license the method and use of the Adeli® suit throughout the United States, which technology is protected by U.S. Patent Nos. D457,965 (hereinafter the "'965 Patent") and 6,213,922 (hereinafter the "'922 Patent").

7. True and accurate copies of the '965 Patent and '922 Patent are attached hereto as Exhibits "A" and "B," respectively.

8. NOMC operates a hospital-based intensive therapy clinic it calls Euro-Peds®. According to NOMC, certain of its therapists were trained and employed at the Euromed Rehabilitation Center in Poland in the method and use of the Adeli® suit and generally in what NOMC refers to as "Suit Therapy." Upon information and belief, only one employee of NOMC, Slawek Walenski, used to work at Euromed. At all relevant times he was not a licensed physical

therapist in Michigan, but rather, a physical therapist assistant. Further, NOMC has no other licensed therapists that have been trained at Euromed known to Ayurveda. It is not currently known how long NOMC has been utilizing the Adeli® suit; however, it is believed that its use of Adeli® suits predates the parties' dealings and began at a point in time when NOMC illegally obtained the technology and a number of Adeli® suits on the black market.

9. In late 2001, Ayurveda learned of NOMC's possible use of the technology from persons at the EuroMed Rehabilitation Center. It was reported to Ayurveda that NOMC's use of the technology was competitively advertised against EuroMed Rehabilitation Center in a deceptive manner as "Euro-Peds," capitalizing on the similarity in names and suggestion that it was authorized to utilize authentic Adeli® technology within the United States. Ayurveda Joint Stock Company then sent a letter to NOMC expressing its concerns of patent infringement. In response, NOMC's counsel sent a letter on January 2, 2002 claiming that NOMC was not infringing on any valid claims of the '922 patent and threatened to seek attorney's fees from Ayurveda pursuant to Title 35 U.S.C. § 285 if Ayurveda pursued infringement claims against NOMC.

10. Between January 2002 and May 2003, NOMC corresponded with Ayurveda in Russia concerning the subject technology. During this time, a lawsuit was commenced against Richard Koscielny, a former NOMC employee, and his company TheraSuit, which he had formed to create a competitive suit. Ultimately, a stipulated order was issued withdrawing the litigation by

agreement of the parties. During this time, Ayurveda USA, LLC was created to represent Ayurveda's U.S.-based interests with local personnel who better understood the United States marketplace. NOMC then began feigning an interest in acquiring the technology legally from Ayurveda USA, LLC and represented that it had a sincere desire to enter into a license agreement with Ayurveda to authorize its use of the Adeli® suit and the methods developed by Ajurveda Joint Stock Company.

11. On May 21, 2003, JoAnn DiGiovanni, the Administrator of NOMC's Euro-Peds® clinic, sent an e-mail to Ajurveda Joint Stock Company in Moscow inquiring about the Adeli® suits. In that e-mail, she inquired on behalf of NOMC as to whether Ayurveda would be willing to sell Adeli® suits and extra suit parts to Euro-Peds®. Additionally, she expressed NOMC's interest in discussing how NOMC could pay royalties to Ayurveda for the use of the Adeli® suit.

10. On May 23, 2003, Boris D. Peninsky, the Deputy Director of Ajurveda Joint Stock Company confirmed its interest in cooperating with NOMC on the basis of NOMC's licensed use of the technology. In that e-mail, Mr. Peninsky directed NOMC to contact Sam Kiderman, the Managing Member of Ayurveda USA, LLC who represents Ayurveda's interests in the United States.

11. Discussions continued from May 2003 and July 30, 2003, when Sam Kiderman met with Robert L. Davis, the President and CEO of NOMC, JoAnne DiGiovanni, Gary Barnes, the CFO of NOMC, Colleen Noble, M.D., Medical

Director, and Angela Jackson of Euro-Peds to discuss forging a formal relationship. During their discussion, NOMC desired an immediate fifteen (15) suits, but Ayurveda agreed to advance to NOMC the use of only two (2) Adeli® suits in anticipation of a signed agreement.

12. On August 1, 2003 following their meeting, NOMC's President sent a letter to Ayurveda again expressing, among other things, its interest in a licensing agreement. On August 5, 2003, Sam Kiderman followed up with a letter to NOMC setting forth key terms to a relationship between Ayurveda and NOMC. Mr. Davis responded on behalf of NOMC on September 8, 2003.

13. In November 2003, Ayurveda sent a Draft License Agreement to NOMC.

14. On or about December 2, 2003, Ayurveda and NOMC executed a letter of intent (LOI) in light of NOMC's expressed continued desire to obtain a license to utilize the Adeli® suit and the method accompanying the suit in return for appropriate and reasonable remuneration to Ayurveda. In the LOI, a copy of which is attached hereto as Exhibit "C", the parties expressed their desire to enter into a license agreement within ninety (90) days, with the option of extending the LOI in writing by mutual agreement of the parties if their efforts to finalize a license agreement did not materialize within that time frame (see LOI at ¶ 1). Additionally, the LOI contemplated a full license to NOMC to utilize the licensed technology in exchange for a license fee and royalty payments to Ayurveda (see LOI at ¶¶ 2.1 and 2.2).

15. On March 12, 2004, because there was no signed license agreement, Sam Kiderman sent a letter to Robert L. Davis requesting that he sign a thirty (30) day extension on the LOI ("LOI extension"), asking that the parties in writing express their intent to be bound by the terms of the LOI through April 2, 2004. Mr. Davis signed and returned the LOI extension to Ayurveda. Negotiations ensued, and NOMC orally agreed to pay a royalty minimum based upon NOMC's historical earnings starting retroactively back to January 2004 after final execution of an agreement for the authorized use of the Adeli suits®.

16. On April 7, 2004, with the LOI extension expired, Ayurveda's counsel sent a certified letter to NOMC. The letter stated, in pertinent part:

After over eight months of negotiations to secure the rights to utilize this intellectual property there has been no agreement reached. Your ongoing activity is causing immediate and irreparable harm to Ayurveda USA, LLC. It is important in mitigation for you to choose one of the following two courses of action immediately:

- I. Confirm to us in writing within ten (10) days of receipt of this letter that: (i) you have stopped making, using, or sell all infringing devices; and (ii) you will refrain from making, using, or selling any such devices in the future; or
- II. Contact this office IMMEDIATELY upon receipt of this letter to indicate (i) you have stopped making, using, or sell all infringing devices; and (ii) you have a bonafide intention to enter into a recurring, non-exclusive license of the technology owned by Ayurveda USA, LLC.

17. On April 17, 2004, NOMC's counsel sent a letter to Ayurveda's counsel stating that it still was in the process of reviewing the most recent response to the draft License agreement, that it remained interested in entering a

license agreement with Ayurveda, but that it was not infringing upon any patent rights of Ayurveda.

18. Again, Ayurveda's counsel responded on April 21, 2004, pointing out the failure of NOMC's counsel to consider the '965 and '922 Patents in its erroneous assertion that NOMC was not infringing. Further, the letter expressed Ayurveda's belief that NOMC was "foot dragging" for over 8 months, had refused to arrange any meetings to negotiate the final issues and concerns, and was disingenuous in its feigned assertion that it remained interested in entering into a license agreement.

19. After the expiration of the LOI extension, continuing its pattern of delay, on May 26, 2004, NOMC sent a letter to Ayurveda requesting additional information it ostensibly needed before it could proceed with further contract negotiations. Up through and including that time, NOMC had never expressed any concern that it was lacking information necessary to allow it to formally enter into a licensing agreement with Ayurveda, nor had it returned the two Adeli® suits it had previously received on loan. That same day, Ayurveda's counsel sent a letter to NOMC providing the requested information and expressing his view that there was no reason why the transaction could not be consummated before June 1, 2004, and that NOMC's untimely request for information was simply an additional effort to delay Ayurveda's assertion of its rights against NOMC. In fact, the information requested by NOMC included proof of Ayurveda's ownership of the subject technology, which information was

publicly available with the United States Patent and Trademark Office. See attached hereto as Exhibit "D" USPTO Notice of Recordation of Assignment of Patent & Trademark.

20. That same day, NOMC's counsel sent a letter to Ayurveda's counsel, but for the ~~first~~ time, erroneously suggested that the two (2) Adeli® suits in use by NOMC were offered for sale to NOMC at a price of \$500 if the parties reached an agreement on the terms of a license agreement or a price of \$2,000 if the parties did not reach an agreement, and requested an invoice in regard to payment. This alleged offer to allow NOMC to acquire the suits without the payment of a licensing fee and royalties has absolutely no support and is belied by the parties' correspondence of September 8 and September 17, 2003.

21. On or about October 7, 2004, Ayurveda's counsel sent another letter to NOMC's counsel asking that NOMC cease and desist its continued infringement of the subject patents. On October 18, 2004, NOMC's counsel responded that it was in the process of providing Ayurveda with a response. A response was finally provided on October 29, 2004, wherein Ayurveda's counsel again asserted that NOMC was not infringing upon any patent or trademark rights of Ayurveda. In this letter, however, NOMC states that it was using suits purchased from one of NOMC's former employees, Richard Koscielny, which NOMC claims were modified by Mr. Koscielny and, therefore, according to NOMC, its activities do not constitute infringement upon the '922 or '965 Patents.

With regard to the two Adeli® suits provided on loan to NOMC, NOMC erroneously claimed that an agreement had been reached to sell said suits to NOMC for a mere \$2,000 each in the event the parties were unable to reach an agreement on licensing. This assertion is entirely belied by the draft license agreements theretofore exchanged between the parties contemplating a \$100,000 to \$150,000 license fee, with royalties based on earnings, and minimum annual royalty payments to Ayurveda.

22. Upon information and belief, NOMC, through its Euro-Peds® clinic, is exhibiting the subject technology and/or "knock-offs" thereof at various trade shows throughout the United States in an effort to continually infringe upon the subject patents and generate revenues and goodwill belonging to Ayurveda. Further, the use of the Euro-Peds mark and their other activities is creating actual confusion in the marketplace as to the source of the Adeli® suit therapy.

23. To date, NOMC continues its illegal use of Adeli® suits obtained on the black market, continues its use of the two Adeli® suits that were loaned to it by Ayurveda, and otherwise continues to cause immediate and irreparable harm to Ayurveda through the illegal conduct set forth below.

COUNT I

PATENT INFRINGEMENT

24. Plaintiff repeats and realleges paragraphs 1 through 23 of this complaint as if fully set forth herein.

25. During the term of Ayurveda's patents, without a license of the owner, NOMC has (1) applied the patented designs (and methods), or a colorable imitation thereof, to articles manufactured for use and sale, and (2) has sold or exposed for sale articles of such designs (and methods) or colorable imitations thereof.

26. Defendant has infringed Ayurveda's patents by making, using and/or selling therapy suits, or colorable imitations thereof, covered by the claims of said '965 and '922 Patents in the United States, and will continue such infringement unless enjoined by this Court.

27. As a result of Defendant's acts, Plaintiff has been damaged.

COUNT II

CONVERSION

28. Plaintiff repeats and realleges paragraphs 1 through 27 of this complaint as if fully set forth herein.

29. Defendant has wrongfully controlled or exercised dominion over property belonging to Plaintiff inconsistent with or in denial of Plaintiff's rights.

30. Plaintiff has demanded return of the Adeli® suits in Defendant's possession.

31. Defendant has refused to deliver the Adeli® suits to Ayurveda, the rightful owner thereof.

32. As a result of Defendant's acts, Plaintiff has been damaged.

COUNT III

REPLEVIN

33. Plaintiff repeats and realleges paragraphs 1 through 23 of this complaint as if fully set forth herein.

34. Plaintiff is the owner of the Adeli® suits and methods employed in their use.

35. Plaintiff is entitled to possession of the Adeli® suits from Defendant despite Defendant's refusal to return the same.

36. As a result of Defendant's acts, Plaintiff has been damaged.

COUNT IV

**TRADEMARK INFRINGEMENT/UNFAIR COMPETITION:
FALSE DESIGNATION OF ORIGIN, REVERSE PASSING OFF**

37. Plaintiff repeats and realleges paragraphs 1 through 36 of this complaint as if fully set forth herein.

38. Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), forbids the use of "false designations of origin and false descriptions or representations in the advertising and sale of goods and services."

39. Ohio Revised Code § 4165, *et seq.* (Ohio Deceptive Trade Practices Act) forbids passing off goods or services "as those of another."

40. The Michigan Consumer Protection Act ("MCPA"), M.C.L.A. § 445.903 forbids, among other things, acts or practices "(a) causing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or

certification of goods or services. (b) using deceptive representations or deceptive designations of geographic origin in connection with goods or services. (c) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have."

41. Defendant NOMC has utilized manufactured and distributed for sale, through its Euro-Peds® clinic, the subject technology without providing proper credit to Plaintiff.

42. Defendant's actions are likely to cause public confusion and has caused actual confusion regarding the source and origin of the Adeli® suit and accompanying methods for its use.

43. Defendant's actions are likely to deceive and have actually deceived the public regarding the source and origin of the Adeli® suit and the accompanying method for its use.

44. Plaintiff believes and therefore avers that NOMC's actions amount to trademark infringement under 15 U.S.C. §§ 1051 *et seq.* and/or under the state laws forbidding such actions.

45. As a direct and proximate result of Defendant's actions, Plaintiff has been deprived of extensive and valuable good will, public relations and advertising that otherwise would stem from public knowledge of the true source of the Adeli® suits and accompanying methods for their use.

46. As a direct and proximate result of Defendant's actions, Plaintiff has suffered direct and consequential monetary losses.

47. Plaintiff is entitled to monetary damages from Defendant for its own direct and consequential damages, including lost profits and good will, lost licensing fees, lost royalties, and disgorgement of Defendant's improper profits, and the costs of this action including attorney's fees.

COUNT V

UNJUST ENRICHMENT

48. Plaintiff repeats and realleges paragraphs 1 through 47 of this complaint as if fully set forth herein.

49. Plaintiff has conferred a benefit upon the Defendant through Defendant's use and exploitation of the Adeli® suits and subject technology.

50. Defendant has knowledge of the benefits conferred upon it by its continued use and exploitation of the Adeli® suits and subject technology.

51. Retention of said benefits by Defendant without payment to Ayurveda would be unjust.

52. As a result of Defendant's acts, Plaintiff has been damaged.

COUNT VI

FRAUD

53. Plaintiff repeats and realleges paragraphs 1 through 52 of this complaint as if fully set forth herein.

54. Defendant has made false representations that it had, and has, among other things, an interest in acquiring the subject technology legally from Ayurveda and has represented to Ayurveda that it had a sincere desire to enter into a license agreement with Ayurveda to authorize its use of the Adeli® suits and the methods employed in the use of the Adeli® suits.

55. Said representations are material to the dealings between the parties.

56. Said representations were made falsely, with knowledge of their falsity, or with such utter disregard and recklessness as to whether they were true or false that Defendant's knowledge may be inferred.

57. Plaintiff has justifiably relied upon Defendant's false representations to its detriment.

58. As a result of Defendant's acts, Plaintiff has been damaged.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for:

- A. A finding by this Court that Defendant has infringed United States Patent Nos. D457,965 and 6,213,922;
- B. An award against Defendant for the damages suffered by Plaintiff as a result of Defendants' acts of infringement, conversion, unfair competition, and fraud, with prejudgment interest thereon;
- C. An award against Defendant for exemplary and punitive damages as a result Defendant's fraud, unfair, unconscionable, or deceptive methods, acts or practices.

- D. An order enjoining Defendant and its agents, servants, employees and attorneys and all other persons acting in concert or in participation with Defendant from infringing Plaintiff's United States Patent Nos. 457,965 and 6,213,922.
- E. An order requiring Defendant to return the two (2) Adeli® suits loaned to Plaintiff as well as destruction of the Adelis® suits Defendant illegally obtained on the black market or otherwise.
- F. An order enjoining Defendant and its agents, servants, employees and attorneys and all other persons acting in concert or in participation with Defendant from obtaining Adeli® suits, or knock offs, in the black market or from sources not authorized by Plaintiff.
- G. An award to Plaintiff of attorney's fees, costs and expenses in this action; and that this Court grant such other and further relief as this Court may deem just.

Respectfully submitted,



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JURY DEMAND

Plaintiff hereby demands a jury of the maximum number as to all issues on which it is entitled to a jury pursuant to law.

Respectfully submitted,

Craig P. Kvale

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